Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 04–2 OF 2000(W)

MOHAMED DZAIDDIN CHIEF JUSTICE, STEVE SHIM CJ (SABAH & SARAWAK) AND ABDUL MALEK AHMAD FCJ

27 JUNE 2001

Labour Law *— Industrial Court — Claim for back wages — Whether fact that appellant had been gainfully employed soon after dismissal relevant in exercise of discretion as to quantum of backwages to be awarded*

Dr James Alfred ('the appellant') was appointed general manager of Koperasi Serbaguna Sanya Bhd, Sabah (the first respondent') on November 1984 at a salary of RM8,000 a month. On 15 May 1986, the first respondent leveled charges against the appellant for misconduct alleging abuse of authority, to which the appellant replied. On 1 June 1986, he was dismissed. He lodged a complaint to the Minister of Human Resources and on 19 January 1988, the case was referred to the Industrial Court. The Industrial Court held for the appellant and awarded him backwages and compensation in lieu of reinstatement. Subsequently, the first respondent applied for certiorari to the High Court, but this was rejected, so it appealed to the Court of Appeal (see *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah* [2000] 4 MLJ 87). The appeal was dismissed except for the award on backwages. The appellant then filed for leave to appeal to the Federal Court, which was granted on the question of whether the Industrial Court was bound to deduct or set off from backwages, wages and remuneration earned by the dismissed workman from other employment from the date of dismissal to the date of the award.

Held, dismissing the appeal with costs:

(1) It is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision making process. As such, it was subject to judicial review (see p 533B–D).

(2) There was sufficient evidence before the Industrial Court that the workman appellant had been gainfully employed soon after his

dismissal. This was a material fact which should have been taken into consideration by the Industrial Court in exercising its discretion as to the quantum of backwages to be awarded to the appellant. This was clearly not done in this case. A jurisdictional error of law had arisen. Therefore, the Court of Appeal was correct when it held that the award in respect of backwages was flawed and that the matter be remitted to the Industrial Court for reassessment (see p 533G–H).

[**Bahasa Malaysia summary**

Dr James Alfred ('perayu') telah dilantik sebagai pengurus am Koperasi Serbaguna Sanya, Sabah ('responden pertama') pada November 1984, dan dibayar gaji sebanyak RM8,000 sebulan. Pada 15 Mei 1986, responden pertama telah menuduh perayu dengan tuduhan salah laku dan penyalahgunaan kuasa. Perayu telah menjawab tuduhan tersebut. Pada 1 Jun 1986, perayu telah dibuang kerja dan beliau telah membuat aduan kepada Menteri Sumber Manusia, dan pada 19 Januari 1988, kes ini telah dirujuk kepada Mahkamah Perusahaan. Mahkamah Perusahaan telah memutuskan untuk perayu dan mengawardkan beliau gaji yang belum dibayar (backwages) dan wang pampasan sebagai ganti perlantikan semula. Kemudiannya, respondent pertama membuat permohonan kepada Mahkamah Tinggi untuk certiorari, tetapi permohonannya ditolak. Responden pertama merayu kepada Mahkamah Rayuan (lihat *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah* [2000] 4 MLJ 87). Di Mahkamah Rayuan, rayuan perayu ditolak kecuali award gaji yang belum dibayar. Perayu kemudian memfailkan permohonan untuk kebenaran merayu kepada Mahkamah Persekutuan, dan ini telah dibenarkan di atas isu sama ada Mahkamah Perusahaan perlu memotong atau membuat penolakan daripada gaji yang belum dibayar, gaji dan saraan pekerja yang telah dibuang kerja dari tarikh dibuang kerja sehingga ke tarikh award tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Ia adalah sejajar dengan ekuiti dan nurani bahawa Mahkamah Perusahaan, dalam membuat taksiran jumlah gaji yang belum dibayar, sepatutnya mengambil kira fakta, jika ia dapat dibuktikan atau diakui, bahawa pekerja tersebut telahpun mendapat kerja di tempat yang lain setelah dibuang kerja. Ia adalah penting untuk Mahkamah Perusahaan mengambil kira segala perkara, termasuk sama ada pekerja tersebut telah mendapat kerja yang lain setelah dibuang kerja, dalam menggunakan budi bicaranya dalam membuat taksiran jumlah gaji yang belum dibayar. Budi bicara ini seperti proses membuat keputusan, dan oleh itu ia tertakluk kepada kajian semula kehakiman (lihat ms 533B–D).

(2) Terdapat bukti yang cukup di hadapan Mahkamah Perusahaan bahawa perayu telah mendapat kerja setelah dibuang kerja. Ini

merupakan fakta yang material yang seharusnya diambil kira oleh Mahkamah Perusahaan dalam menggunakan budi bicaranya untuk membuat taksiran jumlah gaji yang belum dibayar yang diawardkan kepada perayu. Ini tidak dilakukan dalam kes ini. Terdapat kesilapan bidang kuasa dalam kes ini, dan oleh itu, Mahkamah Rayuan adalah betul dalam memutuskan bahawa award gaji yang belum dibayar silap ditaksir, dan perkara ini perlu diremitkan kepada Mahkamah Perusahaan untuk ditaksir semula (lihat ms 533G–H).

Notes

For a case on claim for backwages, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1215.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (refd)

Legislation referred to

Industrial Relations Act 1967 s 30(5)

Appeal from: Civil Appeal No W–04–47–97 (Court of Appeal, Kuala Lumpur)

KP Gengadharan (*W Satchithanandhan* with him) (*Genga Maha Wong & Co*) for the appellant.

N Sivabalah (*Shearn Delamore & Co*) for the respondents.

Steve Shim CJ (Sabah & Sarawak). : This appeal concerns a matter of principle. More specifically, it relates to the proper principle to be applied in assessing quantum of backwages awarded by the Industrial Court, the second respondent.

The appellant, Dr James Alfred, was appointed as the general manager of the first respondent, Koperasi Serbaguna Sanya Bhd, Sabah on 1 November 1984 with a salary of RM8,000 a month. On 15 May 1986, the first respondent levelled charges of misconduct against the appellant alleging abuse of authority. The appellant replied to the charges. It made no difference because on 1 June 1986, he was dismissed. He then lodged a complaint to the Minister of Human Resources. On 19 January 1988, the minister referred the case to the Industrial Court. The Industrial Court held that the appellant was dismissed without just cause or excuse. It awarded him backwages and compensation in lieu of reinstatement as follows:

(a) arrears of salary (backwages) from 1 June 1986 to 11 October 1995 (the last date the matter was heard in the Industrial Court);

(b) compensation in lieu of reinstatement of one month's salary for each year of service from 1 November 1984 to 11 October 1995; and

(c) 20 days wages in lieu of unutilized leave. A

The first respondent applied for certiorari in the High Court. This was rejected. It then appealed to the Court of Appeal. The appeal was dismissed except for the award on backwages. The Court of Appeal was of the view that the Industrial Court, in assessing the award for backwages, should have taken into account the fact that the appellant had found other employment B in the period after his dismissal by the respondent. In the circumstances, it ordered the matter to be remitted to the Industrial Court for fresh assessment on the award for backwages. The appellant, dissatisfied with that decision, filed a motion in the Federal Court seeking leave to appeal. Leave was granted on the following question: whether the Industrial Court is bound to deduct or set off from backwages, wages and remuneration C earned by the dismissed workman from other employment from the date of dismissal to date of the award.

Now, it is well settled that awards of Industrial Courts are subject to judicial review on account of jurisdictional errors. In the context of this case, we find that the following passage from the speech of Lord Reid in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 merits particular D citation. It reads at p 171:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity … But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature E that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice … It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend F this list to be exhaustive.

We take the view that the quantum of backwages is a matter within the discretion of the Industrial Court. That discretion is, however, not unfettered. It has to be exercised according to law. In this connection, s 30(5) of the Industrial Relations Act 1967, is significant, and it reads: G

> The court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form.

It seems clear therefore that the court has to act in accordance with equity in the exercise of its discretion. Here, we may also add that we find sufficient merit in the proposition stated in Vol 2 of the 4th Ed of the *Law Of Industrial Disputes* by Malhotra, cited with approval by the Court of Appeal. The H relevant passage on p 961 bears repetition herein. It reads:

> In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a particular case to a particular workman in the matter of compensation by balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice. On the parity I of reasoning, the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of

> unemployment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of backwages is, therefore, a matter in the discretion of the tribunal dependent on the facts of a case. The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. … A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers.

In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. Of course, taking into account such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision making process. As such, it is subject to judicial review.

It is in this light that the factual circumstances of the case have to be examined. Now, the Court of Appeal has stated as follows:

> It is common ground that in August 1988, the respondent found himself other employment in Peninsula Malaysia. Yet, the Industrial Court did not take into account when awarding the respondent his backwages. It proceeded as though the respondent had not been employed elsewhere during the whole of the period in question. The award in respect of backwages is therefore flawed.

It would appear that the Court of Appeal based its observations on what had arisen in the cross examination of the appellant who confirmed that since August 1988, he was employed as general manager, and later as director of another company. The issue was also raised in the submission of counsel for the first respondent as reflected on p 408, Vol II of the appeal record. It is quite obvious that there was sufficient evidence before the Industrial Court that the workman appellant had been gainfully employed soon after his dismissal. In our view, this was a material fact which should have been taken into consideration by the Industrial Court in exercising its discretion as to the quantum of backwages to be awarded to the appellant. This was clearly not done in this case. A jurisdictional error of law has arisen. We therefore agree with the stand taken by the Court of Appeal that the award in respect of backwages is flawed and that the matter be remitted to the Industrial Court for reassessment.

Given the conclusion stated, we find it unnecessary to answer the leave question in the way it is postulated. It is sufficient to repeat what we have enunciated earlier, that the Industrial Court should, in assessing the quantum of backwages, take into account the fact, if established by evidence

or admitted, that the workman has been gainfully employed elsewhere after his dismissal.

For the reasons stated, the appeal is dismissed with costs. The deposit is to account for taxed costs.

Appeal dismissed with costs.

Reported by Chew Phye Ken